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CONFLICT BETWEEN FEDERAL AND STATE COURTS

Mr. Justice Sutherland had hardly warmed his seat upon the Federal Supreme Bench before he was called upon to pass on one of the most delicate subjects involved in American Jurisprudence—the relations and danger of conflict between the Federal and State nisi prius courts. Kline v. Burke, 4 U. S. Sup. Crt. ad. op. (1922-3), p. 91 (Dec. 15, 1922). The opinion leaves nothing for future dispute and so disposes of the principles involved as to satisfy the most determined disputant. Inasmuch as its discussion involved a sound conception of the underlying principles of the American dual form of governments, the assignment fell to the right Justice. The addresses, books and pamphlets of the well-known jurist throw a prophetic illumination upon his mode of thinking.

Citing and following Covell v. Hayman (111 U. S. 176, 182, 28 L. ed. 390, 392), he drew a distinction between the two jurisdictions of which the Bar is not always mindful. It is the distinction between jurisdiction of actions in rem and personam. The instant case belonged in the latter class. "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other * * * is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system * * * when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty * * *. The same rule applies where a person is in custody."

We have thought it helpful, if not necessary, concerning actions in rem, to quote because the learned Justice declares "a controversy is not a thing" and draws the distinction upon which the right is announced for the pendency of two suits or actions in both jurisdictions over the same controversy. And the litigation may be carried on simultaneously to final judgment, the power to suspend being found only in a plea of *res judicata*. The suspension would come about by the ascertainment of the fact "as the Court would determine any other question of fact or law arising," in which nothing but a personal judgment is sought. Manifestly another action pending, in whatever court, neither ousts the jurisdiction of the first court, nor does it delay or obstruct the exercise of jurisdiction.

Obviously in the absence from the rule, of the exception of actions in rem, the most unseemly conflicts between Federal and State trial courts would result, tending to the ultimate destruction of the usefulness of both. Its application in equal terms to both Federal and State jurisdictions assures "equal rank." Since the rule, or rather the exception to the rule, is conditioned upon cases where property has been seized, where it is sought to enforce liens against specific property, or to marshall assets, or to administer trusts, or to liquidate insolvent estates and suits of like nature, the question arises, will the exception prevail and priority obtain before there is an actual seizure? The answer is, No. Indeed, the institution of another suit may become necessary because of the dilitoriness or negligence of those in control of the suit first instituted. The learned Justice supplies ground for a negative answer to the question when he speaks

of "where property has *actually* been seized before a second suit is instituted." And this theory would seem to rest in reason, as we have just suggested, and ought to be the rule. Actual possession of the res, alone, should govern.

The supposed *right*, upon performance of certain conditions precedent, to select the exclusive jurisdiction of one's choice, as being derived from the Constitution, vanishes with the "Kline Case." It is not co-existent with the organic authority to Congress to "create" inferior courts. No doubt the great bulk of the profession would have advised their clients to the contrary. But this belief is more imaginary than real and is based upon the sentiment that Federal Courts are sort of cities of refuge for the use of "foreigners" in other states. That removal from a state court has heretofore been looked upon as a right and probably a "Constitutional" right, hardly admits of a doubt. It appeals strongly that under the limitations in the instant case, the advantages to be derived from removal to a Federal Court are largely regulated by the enterprise of the latter in disposing of a case promptly and that all result may be neutralized by delay. "The Constitution," said Mr. Justice Sutherland, "simply gives to the inferior courts (sic. federal courts) the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * Such an act cannot well be described as a Constitutional right." And surely there can be no question of that plain statement of an obvious truth.

Fortunately a former lack of sympathy with the Federal Courts born, no doubt, with the advent of the "midnight judges" and the subsequent bitter political controversy that ensued, which was inflamed in the South by "Reconstruction" and an unsympathetic, if not unfit personnel, is passing, as do all superficial things. The present generation is looking for efficiency, through harmony and concord and the President is considering qualification and character for the Bench more than political advantage and reward. It is well reasoned opinions like that in the "Kline Case" that satisfy and tend to a permanency of this popular view. It is helpful to be convinced that the court first coming into control of the person or property retains jurisdiction of it and that under all other circumstances, the court that first enters its final judgment will be respected. This seems to be and is in accord with the total absence of "judicial supremacy" or of superiority between Federal and State courts, and ground no longer exists for resentment towards the Federal courts.

No one can complain of this solution and the wiping away of the apparent conflict between Federal and State trial courts, unless it be the person who fears the latter and feels that for reasons of safety, the right to his choice is one that ought not to be infringed. However, in actual practice even under this decision, the opportunity for two suits will be rare and the deprivation of the advantages of removal will be negligible. Students and well wishers of government in America will willingly sacrifice that meagre loss of protection, for a protection it often is, to the end that no occasion for popular resentment may be found by the humblest state court, for said Mr. Justice Sutherland, "the rights of the litigants to invoke the jurisdiction of the respective courts (sic. Federal and State) are of equal rank."

THOMAS W. SHELTON.

Charged with stealing a cheese, a man was brought up before a magistrate. The principal witness, a carter, told how he had seen the man snatch up the cheese and had run up and held him.

"Then you caught him in the nefarious act?" said the magistrate.

"The what, sir?" said the witness.

"You caught him in the nefarious act, I say," repeated the magistrate.

"Not me!" was the reply. "I caught him in the passage just beside the grocer's shop."

NOTES OF IMPORTANT DECISIONS

"PUBLIC GARAGE."—There is a difference between storing automobiles for hire and renting compartments wherein the defendant may store a car, and a building divided into 24 rooms to be rented to individuals for the purpose of storing an automobile therein is not a public garage within the meaning of a city ordinance declaring a public garage "any building or place used in whole or in part for carrying on the business of repairing or storing for hire of automobiles" for the building is not being used for the "business of storing for hire of automobiles". Pratt v.Denver, Colo., 209 Pac. 508. In part the Court said:

"The proposed building is one 40 by 100 feet in width and length respectively, and about 10 feet high. It is to be subdivided into 24 separate rooms or compartments. It is intended by the owner or his lessees to let each room to individuals for the purpose of storing an automobile therein, the tenant of each room to keep his machine under his own control and be provided with an independent lock and key to the compartment. Is the building, then, a public garage? The popular acceptation of the term 'public garage' cannot be resorted to, for the reason that the definition given by the ordinance itself is, as it must be, controlling in this case. In this respect, the ordinance reads as follows:

" 'For the purpose of this ordinance a public garage is defined as any building or place used in whole or in part for carrying on the business of repairing or storing for hire of automobiles, * * * or other motor vehicles.'

"It is seen from this definition that the mere use of a building for storing automobiles does not make the building a public garage. To be a public garage it must be 'used * * * for carrying on the business of * * * storing for hire of automobiles'. If an owner allows the tenant of his building to store an automobile therein, the former is not 'carrying on the business of storing for hire of automobiles', but is merely renting his building to be used as a private garage.

" 'A garage has been likened to a livery stable, for which it has become a substitute to a great extent, and the rules of law governing livery stable keepers apply to garage keepers.' 2 R. C. L. 1210.

"In Congregation Beth Israel v. O'Connell, 187 Mass. 236, 72 N. E. 1011, the plaintiff, a religious corporation, sought to restrain the defendants from erecting a stable within 200 feet of its church building. It was claimed that the stable came within the definition of a statute (Rev. Laws, c. 102, Sec. 70) which read, in part, as follows :

" 'No person shall * * * occupy or use a building for a livery stable or a stable for taking or keeping horses and carriages for hire or to let.'

"The Court held that the statute does not apply to a stable which is let out in specified parts to tenants who take care of their own horses. That case shows that there is a difference between keeping or taking horses for hire and renting a stall wherein the tenant may take care of his horse. So there is a difference between storing automobiles for hire and renting compartments wherein the tenants may store their automobiles. In the former case the party acting would become a bailee, with the obligations of a bailee, and in the latter case he would be a landlord, and not rseponsible, as a bailee, for the safety of the automobile.

"Under the admitted facts in the instant case the building in question is not a public garage, within the meaning of the ordinance, and the city is in no position to rely upon the ordinance as a justification for preventing the plaintiff from proceeding to construct the proposed building."

SUFFICIENCY OF EVIDENCE OF THEFT OF AUTOMOBILE.—A showing by a preponderence of the evidence that the automobile, alleged to have been stolen, was left at a garage by the plaintiff at night, and was gone in the morning without the consent or knowledge of anyone authorized to permit it, was proof *prima facie* that it was stolen, entitling the plaintiff to recover under his policy of insurance against theft, unless evidence explanatory of its disappearance was introduced. In this case, Weir v. Central Nat. Fire Ins. Co., 189 N. W. 794, Supreme Court of Iowa, judgment for the plaintiff was affirmed, the Court, through Weaver, J, in part saying:

"The main proposition upon which defendant seeks a reversal of the judgment below is that the evidence is insufficient to sustain a finding that the insured car was stolen. Under the record as reflected by the abstracts and the conceded facts we are satisfied that there was no error in refusing to direct a verdict for defendant, and that the issue of fact was for the jury. It should be remembered at the outset that the young man, Melsha, is not on trial for larceny in this case, and that the rule which obtains in a criminal case, requiring proof of an alleged theft beyond a reasonable doubt, has no application to a civil action for recovery upon a policy of insurance against theft. To justify a recovery in such action, the insurance being proved or admitted, the policy holder is not required to do more than to establish the truth of his allegation of loss by a preponderance of evidence, and if there be any substantial conflict in the testimony the issue of fact so created is for the jury. That there is here such a conflict of testimony is hardly open to doubt. That the car was taken from the repair shop without the knowledge or consent of the owner or of any other person having any real or even apparent right to authorize it is shown without dispute, and, if the witnesses Beck, Gibbs and Harper tell the truth, the car was taken in the nighttime of Saturday from a locked inclosure, and its

loss was not discovered by any one responsible for its care until Monday following, when it was found wrecked several miles away.

"If this were all the showing made, its sufficiency to sustain the action could not be reasonably questioned. The plaintiff was charged with no burden to prove that the car was stolen by Melsha or by any other particular individual. In order for him to recover, it would have been enough for him to show by a preponderance of evidence that the car was deposited or left in the shop by him or by his agent, and that the next morning it was gone or had disappeared without the knowledge or authority or agency of anyone authorized to permit it. Such circumstances would have given rise to a presumption of theft by some one, and in the absence of evidence otherwise explanatory of the disappearance of the car it would entitle the owner to recover on his insurance policy against theft. In defense of such action it was competent of course for the company to show that the loss of the car was due to some other cause than theft. This it attempted to do by the testimony of Melsha that he took the car for a merely temporary use with the consent of the painter, Harper, intending to return it on Monday, and that such return was prevented only by the accident. This, if credited by the jury, was a good defense, not because Harper had any right or authority to permit Melsha to take the car, or because Melsha acquired any right to take or use the car, but because the taking, though wrongful, for a merely temporary purpose, with the honest intent to return the property, would not be a theft.'

STATEMENT BY BANK THAT CHECK WAS GOOD DID NOT BIND BANK TO PAY IT.—In Flathead County State Bank v. First National Bank, 282 Fed. 398, it is held by the Circuit Court of Appeals, Eighth Circuit, that where plaintiff wired defendant, asking if the check of a certain person on defendant bank for $10,000 was good, defendant's answer that the check was good did not amount to an agreement that the bank would pay the check.

"It was clearly the intention of the Montana bank and A. O. Myhre that the latter was making payment of $10,000 to that bank, to settle in part the liability of his son. But the controversy is between the Montana and Minnesota banks. While it is true that Myhre represented that he had made arrangements with the latter to take care of the check and pay it, there was no testimony to show that he had done so, or that he had any funds on deposit in or available to the Minnesota bank, for the purpose of meeting the check. There is a dearth of circumstances to connect that bank with the transaction. For this reason it is necessary for us to hold that the question of its liability must depend practically on the language of the telegrams; and, to state it more accurately, it is whether the Minnesota bank thereby agreed to bind itself to make payment of this check.

"The case of North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145, decided by this Court, points out the test of liability in such cases. There the inquiring telegram was, 'Will you pay James Tate's check on you, $22,000.00? Answer.' And the answer was, 'James Tate is good. Send on your paper.' It was said the question was 'whether the defendant bank agreed to pay Tate's check, * * * and that in our judgment is just what the bank * * * bound itself to do.' In the opinion it was also said that, if the answer had been limited to the words 'Tate is good', there would be ground for holding that the bank thereby intended an affirmative answer to the categorical question put to it; but all doubt is put at rest by the remaining words of the answer, to-wit, 'Send on your paper.' And the bank was held to be liable upon the check.

"In the present case, the inquiry was whether a certain check was good, and the answer was it was good. There was omission of any language expressive of a purpose to honor the check. We are unable to construe the answer to that effect, without other aiding circumstances. Standing alone, it is technically an affirmation that the check of Myhre was worth its face at the time. The meaning ordinarily would be that the deposit account of the maker was then sufficient to meet the check. But this is different from undertaking to pay it, as would have been the significance of the act of formally accepting or certifying it.

"Another case which is valuable in its application is First National Bank of Dunn v. First National Bank of Massillon (D. C.), 210 Fed. 542, where the inquiry was whether a check would be paid, and the answer was, 'Forward your checks. They will undoubtedly be taken care of by the company when presented.' This was held to fix liability; but it was noted that the inquiry was not whether the party was solvent.

"In the case of First National Bank v. Commercial Savings Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.), 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281, no liability was found, for want of 'absolute promise to pay'. The telegrams were very similar to those here involved, and the decision is in point."

CLASS LEGISLATION.—The legislative act requiring the board of regents of the University of Nebraska to establish and operate a plant for the manufacture of hog cholera serum and to distribute the product to farmers and swine growers at the actual cost of production is not void as a class or special legislation inhibited by the State, or federal Constitution. Fisher v. Board of Regents, 189 N. W. 161.

"Swear the witness to answer all questions."

"Very well, your honor."

"And you might swear the lawyer to question all answers. Nothing like plenty of formality about a court.'"—St. Louis Star.

THE USE OF THE THIRD PERSON AND IMPERSONAL IN INSTRUCTIONS

By W. W. Thornton, Indianapolis, Ind.

An instruction has been authoritively defined as "an exposition of the principles of the law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven".[1]

If such is the case, then the instruction should be in such simple language as is adapted to the minds of men unlearned in the law, devoid of obscure and ambiguous expressions, and without the use of technical words and terms. I do not believe any lawyer or judge will disagree with this statement; and yet our books on instructions contain thousands of instructions which violate this statement of the requisites of a desirable instruction.

Complaints, declarations, answers and replies are drawn in the third person.[2]

Stephen in his work on "Pleading" shows that this practice arose from the fact that, before the days of written pleadings, pleadings were oral and written down by the clerk of the court as part of the records of the court. When written pleadings at law were introduced the lawyers followed the entry of the clerk used by him in the formal beginning of the statement of the plaintiff's cause of action or complaint. The practice has continued for hundreds of years, and is still with us, when the reason for such use ages ago ceased to exist. There is no better instance of the habits of the lawyer to cling to a rule adopted in the past where there is now no reason for its use, arising out of his fear to make or adopt an innovation, however reasonable, because, forsooth, some court may think by the new form used he has committed an error.

This formality of expression in pleadings has no doubt occasioned the use by many courts of the third person in drafting instructions.

The nearer the judge can get to the jurors, and the simpler the language he uses in his instructions, the more effective will be his act in instructing them.

Turning to a recent work containing forms of instructions the third one has the phrase, "The Court instructs the jury" or "The Court instructs the jurors." This is in California. Then follows one from Michigan, another from Missouri, Kansas, Kentucky, Georgia, Mississippi, Tennessee, Delaware, Illinois, Massachusetts, New Jersey, Ohio, Utah, Alabama, Virginia, Iowa and Vermont. There are hundreds, even thousands, of other instructions in this work and several other volumes lying before me where the same phrase is used. Frequently the phrase is varied, as "The jury are (not "is") instructed."

The Judge in giving these instructions was facing the jury. He was talking to them. The jurors were listening to him. He was telling them what the law was as applicable to the pleadings and the evidence actually produced in the trial; and yet he talked to them as if they were not present before him. What would we say if a judge should say, "The Court informs John Smith that oral evidence of the contents of a letter is not admissible when the letter itself can be produced," when John Smith is before him in the trial endeavoring to prove the contents of the letter?

There is another phrase that is used almost universally, and it is this: "You are

(1) Lehman v. Hawks, 121 Ind. 541; 23 N. E. 670, cited; Douglass v. Territory, 1 Okla. Crim. 586; Sturgis v. State, 2 Okla. Crim. 405.
"Directions with reference to the law of the case, enabling the jury to better understand their duty and preventing them from arriving at erroneous and wrong conclusions." Hanson v. Kent & Purdy Paint Co., 36 Okla. 583; 129 Pac. 7.
See also Dodd v. Moore, 91 Ind. 523; and an article in 63 Cent. L. Jr. 5 on the purpose of instructions.

(2) I know of no reason why they cannot be drawn in the first person; but never saw such a one. If it had the requisite allegations I certainly would not hold it demurable because drawn in the first person, unless there were very urgent reasons, backed by respectable authority, requiring me to do so.

instructed," or "The Court instructs you," or, still worse, "The Court charges the jury." In the first phrase the juror has to assume that it is the Judge instructing him; and in the second, if a phrase of that import is to be used why not say, "I instruct you"? Frankly, the Court never instructs. It is the Judge of the court that instructs. Why should not the personal phrase be used and not the impersonal.

Why can we not get away from these anachronisms?

The fact is that it is totally unnecessary for the Judge when he instructs a jury to say that he instructs or is instructing them. The jury understands that.[3]

They know that without him telling them so. Then why tell them. Think of an author in general literature or a public speaker using a similar phrase. He would be hooted out or laughed out or sneered at as an unpolished writer or speaker.

Before me lies two instructions, one from Nebraska and the other from Missouri. The first instruction begins, "If you believe from the evidence," and the second, "If the jury believe from the evidence." In the first instruction the Judge comes down on a level with the jurors, in the other he sits, as it were, on a pedestal looking down upon them. The first is decidedly more effective than the second.

Not only are judges and attorneys in the habit of beginning an instruction with the phrase, "The jury are instructed," or "I instruct the jury," or "You are instructed," or "I instruct you," but in books containing forms of instructions culled from court opinions the editors or compilers of them have very frequently inserted such phrases in the forms they tender where none were used in the originals. One would think editorial pride would not only have prompted them not to insert such phrases, but to efface or eliminate them from the originals.

(3) There is a very acute article in a law journal (now dead) years ago published in Chicago whether the word "it" or "they" should be used when referring to the jury collectively, with a preference given to the word "they".

Surely such editors or compilers should edit the instructions they incorporate in their collections by changing ungrammatical expressions to correspond to good grammar, by clearing up obscure expressions, by effacing redundancy, and by striking out all the "saids." The word "said" should only find a place in pleadings; and then it is altogether too frequently used.

IN THE TWILIGHT ZONE STATE AND FEDERAL JURISDICTION

By Wm. M. Rockel, Springfield, Ohio

The railroad, telephone, the post office, the growing density of population and the interchangeable needs of the people of this nation, have created a condition of affairs that is constantly increasing the prestige of the United States Government, to the disadvantage of the state government.

It is the natural tendency of all courts and legislative bodies to give to themselves the utmost limit of power; and the same is true of the people when they seek to reach a desired result.

So we find criticism of courts and legislatures when they fail to act on certain propositions in a manner to accord with desired results and policies, and this criticism oft comes from persons who ought to know better. The fact is that there is a growing feeling in the individual that constitutions are mere scraps of paper and legislative acts are not of much sanctity. They forget that there is no intermediate station between disobedience of law and anarchy. They fail to realize how much they are indebted to law for the things they enjoy, howsoever limited they may be. The person with no property whatever has his person protected, and goes from place to place as secure as a king. If some of these people would read a little more of the history of the human race, and less of plotting schemes to aggrandize themselves

at the expense of their fellowmen, they would arrive at wiser conclusions.

Some time ago the United States Supreme Court held for naught an act of Congress fixing the hours for child labor. Immediately it was heralded that the Supreme Court was capitalistic and against the poor and down-trodden. Samuel Gompers, President of the American Federation of Labor, joined in this criticism, when he knew, or should have known, that the policy of the law had nothing whatever to do with the Court's decision.

The enactment of child labor laws and those of kindred character, it is well known, owe their validity to what is called the police power of the state.

While it is impossible to circumscribe the limits of this power, it has its basis on the theory that it is the right and duty of the government to control by legislation all things that may hurt or harm the people. But in this country no legislative body possesses any power, except such as it may have by reason of some constitutional provision. With us the supreme authority rests with the people. As we have not a pure democracy but a representative government, this will of the people is exercised in the manner the people have chosen.

The powers possesed by legislative bodies are generally the result of the growth of a number of diversified interests and situations. No two of the thirteen colonies had the same kind of a government, except that all in some maner recognized the King of Great Britain as their sovereign. The charters of all, either by their terms, either expressed or assumed, recognized that the matters pertaining to local government were in the colonies and not in the home government. The colonies having had trouble with the powers claimed by the King, their sovereign, were loath in the formation of a new government to give up any more authority than was absolutely essential to the successful operation of that government, and therefore it followed that the Federal government had only such powers as were expressly given to it by the Constitution. If the power to do a certain thing was not expressly given to it by the Constitution, that power did not exist for the general government. The power to legislate for the general welfare of the people is not found among the enumerated powers; therefore the power to pass laws by virtue of the police power, is not in the United States Congress. Legislation similar to the Child Labor Law must come from the state legislature, no matter how desirable it might be from a national standpoint.

Lawyers frequently forget, and laymen do not realize the powers of the various governments under which we live, and it is necessary to go back to fundamental principles.

Act X of the United States Constitution declares:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Sec. VIII of Art. I contains nineteen enumerated powers granted and Sec. IX, eight prohibited powers, while Sec. X contains nine inhibitions against the states exercising certain powers.

We, therefore, have in the Federal Constitution three defined powers, and one added as necessary to carry into effect the powers expressed. These are generally referred to as *enumerated powers, incidental powers, powers prohibited to the Federal government, and powers prohibited to the states.*

In the Federal Constitution all powers are to be considered as prohibited which are not expressly or incidentally conferred. In state constitutions all powers are considered as conferred which are not expressly or incidentally prohibited. In state matters it therefore occurs that there is a limitation by the Federal Constitution

and the state constitution. There are also to be found certain matters in which there is a concurrent power in the Federal government and the state government.

The Constitution of the United States giving only such powers as are delegated to it, a question early arose whether there could be any power except such as might be included in the words granting the power. In other words there could be no *incidental powers.* This was the view of the strict constructionists; yet there does not seem to have been any very substantial ground for this view, although for a while it was strenuously advocated. The last clause of Sec. VIII, in which the enumerated powers are found, closed with the following words:

> "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the government of the United States or in any department or office thereof."

What may constitute an *incidental power* may, notwithstanding the above provision, yet be said to be in the *twilight zone.* Two rules have been laid down which it is said may be safely used in determining whether a measure is within the sphere of incidental powers.

First: There must be a primary or general power, *expressly conferred* by the Constitution.

Second: The measure must be a convenient and proper means of carrying into execution this primary power. In substance it is power to pass all laws which may be requisite for effecting any of the objects specified in the Constitution.

Yet in this age, when there is a tendency to diminish the powers of the state, and enlarge those of the general government, care must be exercised in not considering any measure an incidental power, merely because it is a desirable governmental action regardless of whether or not it is a proper exercise of a power which the Federal government possesses.

In the early history of our government the Federalists were generally in favor of a liberal construction of governmental power, and the Democrats or Republicans, as they were then called, were the strict constructionists. Yet, when Jefferson made the Louisiana purchase, it was held, as an *incidental* power, it could be done. It is somewhat difficult to determine under what primary grant of power this could be incidental, except by a general and very liberal construction, that incident to the "common defense and general welfare" of the people, declared in the preamble of the Constitution. It was finally justified on the general power to make treaties. Am. Ins. Co. v. Canton 1, Peters, 511. This was surely in the twilight zone.

Scarcely less so is the power to pass alien and seditious laws as was done in 1798. There is no express power to enact such laws in the United States Constitution, and it can only be justified on the ground that every government has belonging incidentally to it, the power of self protection.

The power to lay an embargo and establish a military occupancy, have both been justified as incidental to the power to conduct war and protect our citizens, only on a very liberal construction.

The power to give priority to the United States as a creditor over other creditors where a debtor becomes insolvent, is sustained by virtue of no express provision of the Constitution, but incidental to the power to collect the revenues and defray the expenses of the government.

The power to create a corporation for any purpose is nowhere expressly conferred on the Congress of the United States, yet in a number of instances it has exercised the power as an incidental power. Perhaps the first and most noted case was the incorporation of a National Bank in 1791. It was justified on the broad ground that it was a useful agent or instrument of the government in its fiscal operations.

McCullough v. Maryland, 4 Wheaton, 316. Then, as an incident to the power to regulate commerce, a corporation was formed to build a bridge across a river between two states. Luxton v. North River Bridge Co., 153 U. S. 525, and as an incident to the power to create post roads and railroads, are incorporated. California v. Central Pac. R. R., 127 U. S. 1. Telegraph lines are classed as instruments of commerce and may be incorporated. Raterman v. Western Union Tel. Co., 127 U. S. 411. Under and incidental to the power "to lay and collect taxes, duties, imports and excises" a protective tariff law is held to be valid. It is difficult in such cases to separate the protective feature from the revenue feature. If a law was purely protective and did not result in the collection of any revenue, there would be room for question; possibly it might be held that it would be of such character, protective of the general welfare of the people, that it could be justified on a liberal construction; it is in the twilight zone.

A very interesting discussion of this incidental power of Congress arose in what is known as the Legal Tender cases. In 1862 Congress passed a law making the treasury notes, or what are known as government paper or currency, a legal tender for all debts, etc. Before that only gold and silver coin were legal tender. The gold dollar was worth twice the paper dollar.

The effect of this was that in the payment of debts incurred before the passage of the act, it permitted a payment of them in money that was only one-half the value in purchasing power of the money which was a legal tender at the time the debt was incurred. On the face this looked very much like confiscation of property—and of course would be resisted by the creditor class.

It came before the Supreme Court first in 1869 in the case of Hepburn v. Griswold, 8 Wall. 603. By a decision of five to three the law was declared unconstitutional, because "there is in the Constitution no express grant of legislative power to make any description of credit currency a legal tender in payment of debts." "That the making of notes or bills of credit a legal tender in payment of pre-existing debts, is not a means appropriate, plainly adapted nor really calculated to carry into effect an express power vested in Congress."

The question again came before the Court next in Knox v. Lee, 12 Wall. 457, and the Griswold case was overruled by a five to four decision. A Supreme Justice having resigned and the Court having been increased from eight to nine, two new Justices were appointed between the times of the two decisions. It was charged at the time that the President knew how the new Justices would vote on this question, and that fact induced their appointment. Of course there is little to substantiate the truth of this charge, and it probably originated in the brain of some member of the political party opposed to the President. But it certainly was a question in the twilight zone and of very great importance. The prevailing opinion in the first case was written by Chief Justice Chase, and the dissenting opinion by that great constitutional lawyer, Sam'l F. Miller. In the second case the prevailing opinion was written by Justices Strong and Bradley, the new Justices, and Chief Justice Chase and Justice Clifford gave the dissenting opinions.

The opinons of the Justices sustaining the validity of the law concede that the power to pass the law does not come alone from any one of the expressed enumerated powers, but rather from several, the principal being that it came within the power to borrow money, the nation at the time being in the throes of a civil war, and having to borrow money to conduct the war, one Justice saying that in times of war it is as necessary for Congress to control the purse as it is to control the army, Justice Miller declaring:

"The legal tender clauses of the statutes under consideration were placed emphatically by those who enacted them, upon their necessity to further borrowing of money and maintaining the army and navy. It was done reluctantly and with hesitation and only after the necessity had been demonstrated and had become imperative. Our statesmen had been trained in a school which looked upon such legislation with something more than distrust. The debates of the two houses of Congress show that on this necessity alone could this clause of the bill have been carried, and they also prove, as I think very clearly, the existence of that necessity."

Chief Justice Chase, however, did not agree that it was a necessity, saying:

"We have no hesitation therefore in declaring that the making of these notes a legal tender was not a necessary or proper means to carry on the war or to the exercise of any express power of the government."

On this question of necessity the Justices upholding the law, reply, quoting from Chief Justice Marshall in McCullough v. Maryland, 4 Wheaton 416, that:

"When the law is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake, has to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and treads on legislative ground."

And that before the legal tender act could be held to be unconstitutional the Court must be convinced

"They were not appropriate means or means conducive to the execution of any or all the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness) or we must hold that they were not prohibited." (Justice Strong, Knox v. Lee.)

"I do not say that it is a war power, or that it is only to be called into exercise in time of war, for other contingencies may arise in the history of a nation which may make it expedient and imperative to exercise it. But of the occasions when, and of the times, how long it shall be exercised and in force, it is for the legislative department of the government to judge." (Justice Bradley, Knox v. Lee.)

This decision, except as showing the growing trend of thought in the way of a liberal construction, did not determine any question except that the *condition of the times* justified the holding that Congress had an implied power to pass the law, because Congress judged it was necessary and the power was not prohibited.

The Justices that upheld the law, *i. e.*, Miller, Davis, Swayne, Strong and Bradley, were of the party that conducted the civil war to a sucessful close, and unconsciously in sympathy and accord with its policies and legislation. That, while Chase had been in Lincoln's Cabinet, he never was much of a Republican; Field had previously been a Democrat, and Clifford, Nelson and Greer were of an earlier generation and closely allied with the Democratic party, and this party, as a party, was always considered as strict constructionists of the Constitution.

Judges almost without exception intend to be impartial, but it is the next thing to an impossibility for them not to be influenced in the trend of their thoughts by their party affiliations, and in questions of doubt, favor the principles and policies advocated by the party to which they may then belong, or had, prior to their election to the Bench.

Naturally the Republican party was for a liberal construction. It fought the civil war for the supremacy of the general government. There is no doubt but that a wave of liberal construction of the United States Constitution followed the civil war.

It predominated in the days of reconstruction, and it permeated the minds of the people with the belief that the Federal government possessed full power to legislate on whatever subject the welfare of the people might demand. No doubt we have been drifting away from the ancient moorings of our fathers.

The time has come for us to halt and consider the principles upon which our government was founded if we wish to prevent ourselves from drifting in an open sea of anarchy and confusion, without rudder to guide us to a safe harbor. *We want more respect for law and order; we want less thoughtless and critical criticism of our government and its governors.*

In order that this government may be of the people, for the people and by the people, and not perish from the earth—no bloc or class must possess any rights or privileges that are against the public good. In the language of the great emancipator, this nation cannot survive half slave and half free.

BILLS AND NOTES—SALOON KEEPER'S NOTE TO BREWER.

MASSOPUST v. LEMBECK & BETZ EAGLE BREWING CO.

118 Atl. 630.

Court of Chancery of New Jersey.
October 31, 1922.

A note of a saloon keeper to a brewer, which was given when he took over the saloon, on account of fixtures therein belonging to the brewer, but which according to agreement and its custom he was not to be called on to pay so long as he bought its beer, will not be converted into an absolute promise to pay, and enforcement allowed, on prohibition going into effect; for, performance of the contract to buy beer becoming unenforceable, the penalty for nonperformance also became unenforceable.

Thomas Brown, of Perth Amboy, for complainants.

D. Eugene Blankenhorn, of Jersey City, for defendant.

FOSTER, V. C. Complainants seek to have defendant restrained from prosecuting an action at law on a promissory note given by them to defendant for $2,025.25, on the ground of an alleged oral agreement between the parties that complainants were not to be liable for the payment of the note, nor the chattel mortgage given as security therefor, unless they refuse to purchase the lager beer of the defendant at a fair market price, and on the further ground of a custom existing in the dealings of defendant with other saloon owners in Perth Amboy, which custom was to relieve such saloon keepers from the payments of similar notes and mortgages.

The note and chattel mortgage were given under the following circumstances: On March 21, 1917, complainants purchased the saloon and hotel business of one George C. Hriczko in Perch Amboy for $28,500, and on the same day they signed the promissory note in question, which is payable on demand, and also executed the chattel mortgage on the saloon fixtures to secure the payment of this note. It appears that said George C. Hriczko had been engaged in the saloon business in Perth Amboy for many years, and that in 1908 he was a customer of the Central Brewing Company. On June 17, 1908, defendant purchased from the Central Brewing Company its claim against Hriczko, consisting of a chattel mortgage on his saloon fixtures and his note for $1,000. Between 1908 and 1912 additions and repairs were made by defendant to these fixtures at a cost of $898.25, and on January 19, 1912, Hriczko gave defendant a new note and chattel mortgage for $1,898.25, and between 1912 and 1915 further repairs or additions were made by defendants to the fixtures at a cost of $127, making the total of the alleged indebtedness due on June 30, 1915, from Hriczko to defendant $2,025.25, which is the amount of the note in suit, and admittedly the payment of neither the principal nor interest of this indebtedness had ever been demanded from Hriczko during all the years he was in business and purchased and sold the products of defendant. Defendant claims this sum represents the true value of the fixtures at the time complainants purchased the business, while complainant's proof shows that a substantial part of the fixtures were secondhand when Hriczko acquired them, about sixteen years ago; that some of them were rather useless, and that some of them had been removed to this saloon after considerable use in other saloons, and that at the date of this transaction these fixtures were worth about $500.

The complainant Massopust has lived in Perth Amboy for about 37 years; for about 10 years he conducted a saloon and purchased his beer from defendant; later he engaged in the real estate business and as a broker he has sold 25 or more saloons in Perth Amboy, or its vicinity, that were doing business with defendant; that he has known William F. Thiele, the agent of defendant, for over 15 years, and has had dealings with him in effecting the sale of saloon properties.

The other complainant, Kutcher, was the agent or collector of the defendant for over 23 years, and he continued in defendant's employ for about a year and a half after the purchase of this saloon and hotel business. Thiele was his immediate superior, and was called his boss, and he and Thiele for years had the most intimate business relations.

Both complainants testify that for years they were familiar with the practice of defendant to furnish chattels to be used in the saloon business, where the beer manufactured by defendant was sold; that defendant made it a practice to charge for the fixtures thus installed, as well as for all additions and repairs to the same, and also for the money which defendant sometimes advanced, and that the amount thus charged was represented by a promissory note of the saloon keeper payable on demand and secured by a chattel mortgage on the fixtures; that it was also the practice of defendant never to ask for the payment of such notes and mortgages so long as the saloon keepers continued to sell defendant's products; that the indebtedness thus represented was considered the indebtedness of the place, and not of the proprietor of the saloon, and that a purchaser of a saloon was expected to assume this indebtedness by his own note and mortgage on the like understanding about his liability for their payment.

With these practices of the defendant in mind, complainants agreed in January, 1917, to purchase the saloon business and property of Hriczko and to assume his indebtedness to defendant for the fixtures. At this time defendant held a mortgage for $10,000 on the hotel property and also held Hriczko's note and chattel mortgage on the fixtures for $1,895.25. Defendant accepted payments from complainants, which reduced its real estate mortgage to $7,000, and consented to make this amount subject to a first mortgage of $15,000, which complainants borrowed to buy the property, and when the transaction was closed in March, 1917, complainants gave defendant the real estate mortgage for $7,000, and the note and chattel mortgage in suit. On June 19, 1919, defendant demanded the immediate payment of the balance due on the $7,000 mortgage, and three days later began proceedings to foreclose this mortgage.

Complainants testify that before signing the note and chattel mortgage they were assured by both Mr. Thiele and Mr. Lembeck that the usual practice respecting the note and chattel mortgage would continue, and that Thiele told Kutcher complainants would have to give the note and chattel mortgage, and when Kutcher told him it wasn't necessary, Thiele said it was, "so we can show something to keep our books and things like that in the office straight," and further—

> "that we have got to have something to show when you sell it again, this goes over to the next man. You have nothing to do with it. As soon as you sell out again, we turn it over to the next man."

Thiele further told him that so long as complainants dealt with defendant at the market price and sold their products there would be no demand made for the payment of the note and chattel mortgage. Thiele denies having made these representations, and defendant attempted to show that if Thiele ever made them, it was after complainants had agreed in January to purchase the property and business, and also to show that if Thiele ever made these representations, he was without authority to do so. I find the proofs convincing that Thiele made these representations to induce complainants to sign the note and chattel mortgage, and that he was acting within the scope of his authority in doing so. The record also shows that no serious effort was made by defendant to contradict complainants' evidence of its practice to refrain from collecting such notes and chattel mortgages, so long as the saloon keeper sold its products.

From the date of the purchase complainants continued to perform this agreement by dealing only in the products of the defendant. In March, 1918, as a result of federal regulations limiting the use of cereals and coal, all of the brewery's customers were rationed, and the price was increased to $9 for a half barrel of beer. When complainants learned they were being charged $17 a barrel, $2 of which was being credited on the chattel mortgage, they objected, and when defendant ceased making any deliveries of its beer or other products, complainants then, for the first time, purchased beer from other breweries. And finally when, as a result of the adoption of the Prohibition Amendment and the enact-

ment of the Volstead Act (41 Stat. 305) it became impossible for complainants to legally perform their agreement to purchase and sell defendant's products, payment was thereupon demanded of the mortgage on their real property and of this note and chattel mortgage.

The bill has evidently been framed to bring the case within the rule stated in O'Brien v. Paterson Brewing & Malting Co., 69 N. J. Eq. 117, 61 Atl. 437, and later in Gallagher v. Lembeck & Betz Eagle Brewing Co., 86 N. J. Eq. 188, 98 Atl. 461, and I find the proofs to establish the allegations of the bill, relating to the practice of the defendant and its custom in the trade not to enforce the payment of notes like the one in suit; and I also find the evidence to establish the representations which were made by the defendant's agent, to induce complainants to execute the note in question.

It is quite apparent from the record that payment of this note was never to be demanded, and certainly not so long as complainants continued to purchase the products of defendant's brewery. When prohibition made further performance of this agreement by complainants, as well as the defendant, impossible, defendant then for the first time sought to make absolute a conditional promise of payment. To permit the consummation of this purpose would clearly be inequitable, for as the law itself prevents complainants from performing their agreement, it necessarily follows that the law also relieves them from a lawful promise that it would now be unlawful for them to perform, and also relieves them from any liability or penalty for nonperformance under such circumstances.

As neither the title of defendant to the saloon fixtures nor the right of defendant to foreclose its chattel mortgage is questioned in these proceedings, and as the proofs clearly sustain complainants' contention respecting the purpose for which this promissory note was given, I will advise that the restraint prayed for be granted.

NOTE—*Saloon Keeper's Note to Brewer, Unenforceable So Long as He Bought His Beer, Rendered Unenforceable by Prohibition.*—This subject is analogous to the question of the effect of prohibition on liquor leases, treated in an article by W. W. Thornton, in 94 C. L. J. 40. See also, Doherty v. Monroe Eckstein Brewing Co., 191 N. Y. Supp. 59. In the case of O'Brien v. Paterson Brewing and Malting Co., 69 N. J. Eq. 117, referred to in the reported case, it appeared that the complainant purchased a saloon located in a building the lease to which was subject to termination on short notice, having no valuable good will, agreeing to pay in cash the value of the stock on hand, and to give a mortgage to defendant brewing company for the amount of an indebtedness owing by the seller of the saloon to defendant for beer, advances, etc., the amount of which was largely in excess of the value of the fixtures, under an agreement that the securities should not be enforced so long as complainant purchased beer from defendant. It was held that complainant, on ceasing to purchase defendant's beer, was entitled to restrain the enforcement of the note and mortgage on tendering to defendant the reasonable value of the fixtures.

ITEMS OF PROFESSIONAL INTEREST

WOMEN JURORS IN UNPLEASANT CASES

The imposition of jury service on women, although it seems to follow logically from their admission to the franchise and to the right of holding all civil offices, has resulted in practice in many grave difficulties. In the case of criminal trials these are not so pronounced, since there a right of challenge usually exists, and can be exercised so as to release women from sitting on juries in cases where evidence of an indecent or unwholesome kind must inevitably be discussed together by the male and female members of the jury when they retire. In civil jury cases no such simple remedy is usually available; in a libel or slander action the unfortunate plaintiff, against whom an indecent charge has been made, nowadays finds himself compelled to go before a jury, which in the ordinary course of events will include two or three women, and lay bare the most delicate matters of private life to be proved before and discussed by them. For the right of challenge is very limited in civil cases, and practically the only way to get rid of the feminine members of the jury is for both counsel and the judge to combine in requesting them not to sit. Unfortunately, some women insist on continuing to sit in such cases, even although no question between the sexes, or matter of public importance, but only the personal decency of a man's life, happens to be in issue. In such cases, while a learned judge, who recently complimented on their sense of duty two women who insisted on remaining to try such a case, may have been right, yet one cannot help feeling that the other women who responded to the judge's appeal by leaving the jury box, showed greater delicacy and consideration for the feelings as well as the rights of others. In a case where a woman's honor and virtue is in question, of course, one can readily appreciate the determination of other women to remain and support her by their presence;

but where, as in the case discussed, there was no issue which affected a woman, the ladies who insisted on retaining their places in the jury box seem to have shown rather an excess of zeal in the performance of public duty. In point of fact no woman should be required to serve on a jury against her will. In other words, female jury service should be perfectly voluntary.—Solicitors' Journal (Eng.).

SUICIDE COMPACTS

Mr. Justice Lush has recently performed a very real public service in boldly counseling juries to disregard the archaic technicalities of our law and refuse to convict of murder the survivor of two would-be suicides who have entered into a joint compact to take their lives. That such a survivor is guilty of murder, according to the strict rule of our Common Law, there is no possibility of doubt; but the ground on which it rests is a little uncertain. Where two persons, A and B, take part in the murder of C, A handing an axe and B felling the victim with it, they are obviously principals in the first degree, for each takes an essential part in the actual homicide. Where A bars a door to prevent assistance arriving, while B does the deed, they are equally principals, but B is now a principal in the first degree and A in the second—for A was only present as an aiding party on the scene of the crime, he did not take a direct part in it. Again, where A counsels or incites B to commit the crime and B does it, A is an accessory before the fact. Also, when A and B conspire to murder C, and A carries out the conspiracy by committing the murder, the better opinion is that B, as well as A, is guilty of murder. In all these cases both A and B are equally guilty of murder; an elaborate discussion of the origin of this rule will be found in Chapter 22 of Stephen's "History of the Criminal Law". Again, when B commits suicide he is in law guilty of self-murder. Hence when A and B conspire together to commit a joint suicide, A and B are jointly guilty of the murder of B, if in fact B succeeds in killing himself. All this is unanswerable logic, but one may reasonably doubt whether it is also common sense. For, after all, in murder the victim does not assent to his killing, and although the law may refuse to treat consent to a crime by the victim as a justification of the crime, yet it does affect the moral category of the act. Indeed, our whole law of murder requires revision in the light of modern ideas.—Solitors' Journal (Eng.), Nov. 25, '22.

BOOK REVIEW

A TREATISE ON THE LAW OF INHERITANCE TAXATION

A copy of the third edition of this book, by Messrs, Gleason and Otis, has been received from the publishers, Mathew Bender & Co., of Albany and New York City. No doubt many are already familiar with this comprehensive work on this interesting subject to the profession. Certainly those engaged in this field of the law should have this volume for reference, since it deals completely with all phases of the subject, with particular attention devoted to New York State procedure.

The text, after the customary Introduction and Table of Cases, is divided into six major parts, dealing at length with the nature of the inheritance tax, transfers subject to the tax, the parties affected thereby, as well as the property, the procedure followed in general in New York in the inventory of estates, their valuation and fixation of the tax and, finally, a review (a) of the various State satutes on the subject, (b) the Federal statutes, viz., the Act of 1916, with amendments, followed by the new Treasury Department regulations relating the estate tax (Regulations No. 63), and (c) the New York statutes down to the present law effective July, 1921.

The Appendix includes a list of State inheritance tax officials, with addresses; list of the several Federal Internal Revenue Divisions, with statement of territory embraced and Division offices; list of corporations affected by transfer tax laws of state of incorporation; New York State inheritance tax forms; brief survey of transfer tax legislation by the several States and subject index to the volume.

IN BAD COMPANY

When a vote is to be taken on some important measure, a Congressman who cannot be present "pairs" himself with some Representative who would vote "aye" to the Congressman's "nay," or vice versa. Once a Democratic member of the House received a letter from an active politician of that party in his district, calling attention to the fact that he was reported in the Congressional Record almost every day as being "paired" with a Republican. "I don't doubt your loyalty to the party," read the letter; "but I think the boys would like it a good deal better if you paired with Democrats instead of Republicans."—Harper's Magazine.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Agriculture**—Laborer's Lien.—Under Rem. Comp. Stat. §§ 1188, 1190, a laborer was entitled to a laborer's lien on a crop, though he did his work during one calendar year and the crop was harvested the succeeding calendar year.—Myers v. Tuval, Wash., 209 Pac. 1087.

2. **Ambassadors and Consuls**—Immunity —A consul duly appointed to the United States by a foreign country, but whose exequatur has been revoked, is not within Judicial Code U. S. § 256 (U. S. Comp. St. § 1233) subd. 8, granting immunity against state court proceedings to ambassadors and consuls.—Savic v. City of New York, N. Y., 196 N. Y. S. 442.

3. **Assignments** — Negotiable Instrument.—In view of Negotiable Instruments Act (Rev. Codes 1921, §§ 8534, 8596), a check is not an assignment pro tanto of the drawer's deposit so as to give the holder a right of action against the bank if payment is refused, unless the bank has certified or accepted the check.—Stankey v. Citizens' Nat. Bank, Mont., 209 Pac. 1054.

4. **Automobiles**—Agency —Where one owns and maintains an automobile for the comfort, convenience, pleasure, entertainment and recreation of his family and entrusts its management to any member thereof, such member will be regarded as the agent or servant of the owner, and he will be held liable in damages for injuries sustained by a third person from the negligent management of such machine on the public roads by such agent or servant.—Aggleson v. Kendall, W. Va., 114 S. E. 454.

5.——Damages.—Evidence of a witness of automobile's value before accident, and of owner showing market value afterwards, justifies finding damages in difference between these amounts.—St. Louis, B. & M. Ry. Co. v. Price, Texas, 244 S. W. 642.

6.——Insurable Interest.—In action on automobile theft policy requiring the insured to have "the unconditional and sole ownership of the automobile," the plaintiff was required to establish his insurable interest in the property by proof that he had the unconditional and sole ownership of the automobile.—Hessen v. Iowa Automobile Mut. Ins. Co., Iowa, 190 N. W. 150.

7.——Negligence Per Se.—Driving an automobile on left side of highway when approaching another vehicle coming in the opposite direction is negligence per se (Stats. 1917, pp. 382, 401).—Blackwell v. American Film Co., Calif., 209 Pac. 999.

8 ——Registration.—Highway Law, § 282, subd. 6-a, as amended by Laws 1920, c. 687, to require payment of a specified registration fee for motor vehicles constructed or specifically equipped for the transportation of goods, etc., does not require payment of such fee, irrespective of the actual or intended use of the vehicle, in view of other provisions of such subdivision, and also subdivisions 1-c and 6.—Zabriskie v. Law, N. Y., 196 N. Y. S. 423.

9. **Banks and Banking**—Bank Book.—A savings bank book, like a bill of exchange or note, is for many purposes a chattel, and not merely an evidence of debt, but representative of it.—Stebbins v. North Adams Trust Co., Mass., 136 N. E. 880.

10.——Ultra Vires.—A company, incorporated under the laws of this state for the purpose of "contracting for and buying and selling securities and bonds, also borrowing and loaning on same and making loans on real estate security," is not authorized to engage in the banking business, and where such company solicits and receives government bonds, on deposit at its established place of business in this state, agreeing to return same or like bonds upon call, or at a time agreed upon, paying therefore a stipulated rate of interest in addition to that called for by the coupons attached thereto, its announced purpose being to use same as collateral to borrow money which shall constitute its working capital, such transactions are beyond its authority, and will be enjoined.—Security & Bond Deposit Co. v. State, Ohio, 136 N. E. 891.

11. **Bills and Notes**—Consideration.—Under Negotiable Instruments Act, §§ 24, 25, where a note was given to secure a debt due on an open account, it was supported by the valuable consideration of a pre-existing debt.—Stalnaker v. Tolbert, S. C., 114 S. E. 412.

12.——Time Check.—Where plaintiff, who financed a railway subcontractor and took an assignment in the name of his brother for moneys coming due the subcontractor, had drafts or checks for wages guaranteed by him drawn on a mercantile company with whom he had deposited money for their payment, such drafts or checks were not properly time checks, but in effect drafts or bills of exchange, as a "time check" is a certificate, signed by a master mechanic or other person in charge of laborers, reciting the amount due the laborer for labor for a specified time (quoting Words and Phrases, First and Second Series, Time Check).—Gerlach v. North Texas & S. F. Ry. Co., Texas, 244 S. W. 662.

13. **Chattel Mortgages**—Conversion.—Where buyer of piano, who had given seller a purchase-money mortgage, shipped piano back to seller's factory for repairs without cost and return the piano to buyer, the seller could not retain the piano because of buyer's default in payment of purchase-money installments when due, but was required to foreclose the mortgage in the regular way, and such retention amounted to a conversion.—Cable Co. v. Greenfield, Ky., 244 S. W. 692.

14. **Commerce**—Rates.—The state has no power to fix ferriage rates over a navigable river from a landing place in a sister state back to its own shore.—City of Bellaire v. Bellaire, Benwood & Wheeling F. Co., Ohio, 136 N. E. 899.

15.——Steamship Agent.—A license tax imposed by a municipal ordinance on a company acting as steamship agent for certain steamship companies in soliciting cargo, arranging for its acceptance, and performing other duties, for a commission on the gross freight charges, is not a direct hindrance or regulation of interstate or foreign commerce, but affects such commerce only remotely, and does not violate Const. U. S. art 1, § 8, cl. 2, reserving to Congress exclusive authority to regulate foreign and interstate commerce.—City of New Orleans v. Texas Transport & Terminal Co., La., 93 So. 751.

16. **Conspiracy**—Representations.—If defendants conspired to induce plaintiffs to purchase interest in oil and gas lease by means of fraudulent representations, and the plaintiffs in reliance on representations purchased interest in lease, they were entitled to recover in an action for conspiracy, though by exercise of ordinary diligence they might have found out the truth, and that such representa-

tions were false.—Oliver v. Huckins, Texas, 244 S. W. 625.

17. **Contracts**—Intention —Where the parties to an agreement make its reduction to writing and signing a condition precedent to its completion, it will not be a contract until this is done, although all of the terms of the contract have been agreed upon. But where the parties have assented to all the terms of the contract, which are fully understood in the same way by each of them, the mere reference in conjunction therewith to a future contract in writing will not negative the existence of a present contract.—Brown v. Western Maryland Ry. Co., W. Va., 114 S. E. 457.

18.——Mutuality.—A contract by a bank to advance money to a corporation being organized to conduct a fish-canning business was not void for lack of mutuality where it was agreed that the company's business should be transacted with such bank exclusively, and the organizers, relying on the contract, subscribed for stock and advanced money to the corporation.—Merchants' Bank of Canada v. Sims, Wash., 209 Pac. 1113.

19. **Corporations**—Notice.—Though, under Civ. Code, § 19, relating to constructive notice, where a purchaser of stock had no actual knowledge of circumstances which would lead her to examine the corporation's books, or of matters which appeared therein, and as there was no duty imposed upon her by law to examine them, she cannot be charged with constructive knowledge of the facts which an examination might have led her to discover.—Prewitt v. Sunnymead Orchard Co., Calif., 209 Pac. 995.

20.——State Statute.—C. S. § 4775, has no applicability to an action by a foreign corporation to protect its property lawfully acquired, and such corporation, which has not complied with the provisions of sections 4772 and 4773, may sue in the courts of this state to recover possession of personal property, where the suit is not based upon a breach or violation of a contract made in its name or for its use or benefit.—D. M. Ferry & Co. v. Smith, Idaho, 209 Pac. 1066.

21. **Damages**—Contracts.—Damages for the loss of fish-canning plants and cannery, loss upon twine which was used by the fishermen, loss on the commissary department, and loss for the decreased catch of fish, may be recovered for the breach of a contract to advance money if such items were reasonably in the contemplation of the parties at the time the contract was made, and if such losses were the natural and proximate results of the breach.—Merchants' Bank of Canada v. Sims, Wash., 209 Pac. 1113.

22. **Executors and Administrators** — Creditors.—The personalty of intestate is the primary fund for payment of debts, including those secured by bond and mortgage, and a creditor, because secured in this manner, is not precluded from sharing in the personal estate, nor the proceeds from the sale of real estate when so sold, as to divest his lien.—In re Jones' Estate, Pa., 118 Atl. 647.

23. **Frauds, Statute of**—Contract.—In case of a written contract for the sale of realty, there must be a formal contract signed by both parties.—Polucek v. Jahoda, N. Y., 196 N. Y. S. 445.

24.——Removal.—Though a parol contract rescinding a land sale contract be within the statute, if the purchaser, in reliance thereon has so acted on it that a failure to complete it according to its terms will work irreparable injury to him, equity will regard the case as removed from the statute, and grant relief.—McDonald v. Whaley, Texas, 244 S. W. 596.

25. **Husband and Wife**—Wills.—The surviving widow has the right, and it is her duty, to control and manage the community property, and, where the community estate consisted of the family homestead, in which the widow had a life estate, and she was prudent and diligent in the preservation of the property, and frugal and provident in the use and application of the fruits and revenues derived therefrom, a daughter was not entitled to more than one-half of the property as against a son of the widow by a former marriage, to whom the widow bequeathed all her property.—Dreyfuss v. Whittle, Texas, 244 S. W. 623.

26. **Landlord and Tenant**—Lease.—Where a lease contained a provision for an extension of the term, in the absence of testimony of a new lease, lessee's continuance in possession for a year after lessor sold the premises will be presumed to be according to the provision for an extension.—Hartley v. Garnham, N. Y., 196 N. Y. S. 401.

27.——Lease.—A tenant, agreeing to make all alterations and repairs at his own expense and to comply with all laws in effect, must bear an expense of fire escapes erected during the lease, as required by Tenement House Act.—Central R. Co. of New Jersey v. De Cozen, N. J., 118 Atl. 625.

28. **Marriage**—Fraud.—Fraud, made a ground by Rev. Code, 1915, § 3004, subd. "d," for annulling a marriage, is a generic term embracing many varying forms of deception, and it may be actively pronounced, or brought about by disingenuous silence; but the fraud must go to the essence of the contract, and misrepresentations concerning wealth or social position will not avoid the marriage.—Williams v. Williams, Dela., 118 Atl. 638.

29. **Master and Servant**—Ratification —The retention of employee after knowledge of the commission of a tort is only evidence of ratification by employer, and not ratification as a matter of law.—McFadden v. Anderson Motor Co., S. C., 114 S. E. 402.

30. **Municipal Corporations**—Evidence.—That an aged person two years after accident creates confusion in using a blackboard at the trial to indicate streets and corners where defendant's automobile struck him is not very material where the situation is otherwise clearly evidenced.—Brown v. Patterson, Md., 118 Atl. 653.

31. **Principal and Agent**—Evidence.—Where principal denied his agent's authority to draw checks in his name paid by defendant drawee bank, and showed he had instructed the bank not to pay the checks, it was error to permit principal's daughter to relate conversation concerning the agency between principal and the agent, had when the bank owner was not present.—Norwood v. Ferguson, Texas, 244 S. W. 619.

32. **Railroads**—License.—That one has no license to operate an automobile struck by a car pushed over a crossing without signal does not make him a trespasser to whom the railroad was not liable unless his peril was discovered in time to have prevented the collision, as the want of license did not contribute to the injury.—St. Louis, B. & M. Ry. Co., v. Price, Texas, 244 S. W. 462.

33. **Sales**—Delivery.—Where buyer of lath had given two orders, one for 50 carloads at $3.30 per thousand, and a later one for 25 carloads at $5.10 per thousand, and the first order required the seller to "complete order at the earliest day possible," the seller was bound to fill the first order before applying the increased price of the second contract to his shipments; the notation on second order to "rush shipments" not authorizing seller to ignore the first contract's requirement for shipment at "earliest day possible."—Bishopric Mfg. Co. v. Ferguson, Ohio, 136 N. E. 902.

34.——Title.—Seller, who accepted check in payment for cattle, and did not present check until after delivery of cattle and until four days after he had received the check, was not entitled to the cattle after seizure thereof while in hands of buyer's agent, under an execution upon a judgment held against buyer, though buyer stopped payment on check, in view of evidence that the parties intended a completed sale, and in the absence of evidence that the check was not drawn against sufficient funds.—Goodwin v. Bear, Wash., 209 Pac. 1080.

35.——Warranty.—In the case of an executed sale of personal property under an express warranty, the buyer may, if the property delivered does not correspond with the terms of the warranty, either keep the property and sue for breach of the warranty, or, in case the purchase price has not been paid, keep the property and recoup the damages sustained by reason of the breach of warranty in a suit brought against him to recover such purchase price, or rescind the contract and return, or offer to return, the goods to the seller, and in case of the seller's refusal to return the purchase price, if it has been paid, maintain an action

therefor, and in case the purchase price has not been paid, such breach of warranty will be a defense to a suit therefor.—Kemble v. Wiltison, W. Va., 114 S. E. 369.

36. **Searches and Seizures**—Constitutional Right.—Where a sheriff had been informed and had reasonable grounds to believe that defendant was transporting liquor in his automobile on a public highway within the county of which he was sheriff, his search of the automobile while on public highway without a search warrant held not violative of defendant's constitutional rights under Const. art. 2, § 10, and Const. U. S. Amend. 4, prohibiting unreasonable searches and seizures.—People v. De Cesare, Mich., 190 N. W. 302.

37.——Warrants.—There was no invasion of the constitutional rights of a bootlegger by an employed investigator, on whose affidavit a search warrant for intoxicating liquor was subsequently issued, going to such liquor dealer's place without a search warrant; he going there as a customer, not to search it.—People v. Christiansen, Mich., 190 N. W. 236.

38.——Warrant.—It is unlawful, under section 6 of article 3 of the Constitution of this state, forbidding unreasonable searches and seizures, for an officer, without a warrant authorizing it, to search a person, except that one legally arrested may be searched for property connected with the offense that may be used as evidence against him, or for weapons or things that may assist escape or acts of violence —State v. Wills, W. Va., 114 S. E. 261.

39. **Sheriffs and Constables**—Trespasser.—The fi. fa. being regular upon its face, and it being the duty of the sheriff to make the money thereon, he would not be a trespasser and liable to the plaintiffs in damages.—Colter v. Livingston, Ga., 114 S. E. 431.

40. **Taxation**—City Land.—Where land, though within limits of a city, was unplatted, uncleared and, for the most part, was unimproved, unfenced, swamp and tide lands, and where even the upland was frequently covered by tides and was full of swamps and small creeks, and it would cost more to clear the uncleared portion of the land than it would be worth after cleared, and the valuation of the land as water front property was wholly speculative because there was no demand for such property, the assessor, in fixing the market value of the lands, could not consider any use to which the land could be put by way of cutting it up into small tracts and selling it off at a large figure. —Finch v. Grays Harbor County, Wash., 209 Pac. 833.

41 ——Valuation.—Sections 6153 and 6163, Comp. St. 1922, being ambiguous as to the basis of valuation of property subject to inheritance tax, held, construing the whole statute, that the proper basis of valuation by the county judge is the "then cash value" of the property at the time of the death of the decedent, which is ascertained by finding the amount of money the property would produce if offered and sold for cash upon the open market at that time.—In re woolsey's Estate, Neb., 190 N. W. 215.

42. **Telegraphs and Telephones** — Damages.—Where through error of a telegram plaintiff lost the sale of cotton, which was sold on discovering the error if he was under the duty to dispose of it sooner to mitigate his loss, this was defensive matter, and the burden was on defendant telegraph company to show that by the use of reasonable diligence plaintiff could have sold to a better advantage.—Western Union Telegraph Co. v. White, Tex., 244 S. W. 389.

43. **Treaties**—Personal Property.—Laws 1921, p. 156, providing that lands conveyed to, or for the use of, aliens shall be forfeited to the state, and defining lands as every interest therein and right to the control, possession, use, enjoyment, rents, issues, or profits thereof, did not violate articles 1 and 2 of the treaty with Great Britain, providing that citizens of each of these countries shall have power to dispose of their personalty within the territories of the other, and their transferees shall be subject only to the same duties which the citizens of the county where the property lies are subject, for the statute did not arbitrarily convert that which has always been known as personalty into realty.—State v. O'Connell, Wash., 209 Pac. 865.

44. **Trusts**—Testator.—The testator's desire for the apointment of a trustee will be observed, although the person whom he sees fit to appoint is not one whom the court would appoint if the appointment were to be made by it in the first instance.—Teater v. Salander, Ill., 136 N. E. 873.

45. **Waters and Water Courses**—Franchise.—Where a franchise to a water company has been construed for several years as giving the company the right to supply water "in the village of Bethlehem South and the villages adjoining in Saucon, Salisbury and Hanover townships," the construction cannot be questioned, except by the commonwealth, even as against a municipality which later acquired the franchise —City of Bethlehem v. City of Allentown, Pa., 118 Atl. 643.

46.——Rates.—Where part of the consumers from a city waterworks were charged flat rates, based on facilities for service, and the rest charged for service through meters, the fact that, because the customers having flat rates were inclined to waste the water, the rate paid per gallon by such customers was less than the average rate per gallon paid by the customers having meters, does not alone show unjust discrimination against meter customers.—Consolidated Ice Co. v. City of Pittsbugh, Pa., 118 Atl. 544.

47.——Riparian Rights.—A river fed by streams and springs, some of which never fail, flowing steadily in a well-defined channel except in very dry summers, when it gets so low that it stands in holes, though is never entirely dry, is such a natural water course as gives rise to riparian rights to the attingent landowners.—Humphreys-Mexia Oil Co. v. Arsenaux, Tex., 244 S. W. 280.

48. **Wills**—Certificates.—A letter inclosing certificates of deposit indorsed to named persons and instructing addressee to deliver the certificates to indorsees, should writer die in the near future, was testamentary in character.—In re Davis' Estate, Pa., 118 Atl. 645.

49.——Evidence.—In contest of will on the ground of mental incapacity, an excerpt from an instrument written by the deceased purporting to be a will found among his private papers after his death with signature torn off, held not admissible on issue of mental capacity in the absence of a showing as to when the writing was made.—Armistead v. Benefield, Tex., 244 S. W. 391.

50 ——Intention.—This is so when such intention is manifest upon the face of the will, or there is a necessary implication—i. e., a highly probable inference of an intention by the testator—to so include illegitimates.—Lembeck v. Harms, N. J., 118 Atl. 537.

51.——Perpetuities.—Provisions not creating perpetuities may be enforced, though in other parts the will is invalid because violating the statute against perpetuities.—Grand Rapids Trust Co. v. Herbst, Mich., 190 N. W. 250.

52 ——Title.—Where a testator devised and bequeathed land and personal property used in connection with a business to his sons, and directed them to organize a corporation and convey such property to it, and provided that, if they failed to do so, the property was given to all the testator's children equally, a corporation organized by the sons, and to which conveyances were made as directed, acquired a fee, and where it conveyed to another company of the same name, which afterwards conveyed to the sons, they acquired title as tenants in common.—New England Trust Co. v. Morse, Mass., 136 N. E. 835.

53. **Workmen's Compensation Act**—Adjudication. One who devotes substantially the whole of his time for a year to supervising the construction of a large building owned by him and another, and in the construction of which the owners hire and pay wages directly to night watchmen at the building, is under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230), so that, if a servant of the contractors erecting the building, in the course of his employment thereon, is injured through the negligence of one of such owners, the servant may not proceed with a common-law action for negligence against the owner, when it ap-

pears that he has sought and obtained compensation from his employers' insurer under the said act.—Gibbons v. Gooding, Minn., 190 N. W. 256.

54.——Award of Compensation.—Section 6, art. 2, c. 246, Sess. Laws 1915, as amended by section 9, c. 14, Sess. Laws 1919, construed, and held to authorize the State Industrial Commission to award an injured employee compensation for a permanent disfigurement of the face, although compensation has been allowed for loss of time for temporary disability.—Hartford Acc. & Indemnity Co. v. State Industrial Com'n, Okla., 209 Pac. 775.

55.——Course of Employment.—The fact that a hotel maid injured while leaving the hotel at the close of the day's work was a passenger on employer's elevator at the time did not change her relation to her employer so as to prevent recovery under the Workmen's Compensation Act; for the injury is one arising out of and in the course of her employment.—Barres v. Watterson Hotel Co., Ky., 244 S. W. 308.

56.——Course of Employment.—A maid working at a large hotel is "engaged in industry" and not in "domestic employment" within Workmen's Compensation Act (Ky. St. § 4880), exempting such employment from the operation of the act; the term "domestic" pertaining to one's home or household.—Barres v. Watterson Hotel Co., Ky., 244 S. W. 308.

57.——Course of Employment.—If compensation claimant knowingly violated the employer's rule forbidding miners to ride empty cars when coming from work, it would only amount to a showing of negligence on his part, and would not take him out of the course of his employment.—New Stauton Coal Co. v. Industrial Commission, Ill., 136 N. E. 782.

58.——Where a pressman had lost one eye previous to his employment, and sustained injury to his left hand, necessitating amputation below the wrist joint, and neither his previous loss of an eye nor the injury to his hand impaired his ability to do his work, he could not recover compensation, under Workmen's Compensation Act, § 8, par. (e), subsec. 18, providing that the loss of any two members of the body shall constitute total and permanent disability, but could only recover for the loss of a hand under subsection 12, subject to credit for payments made by the employer under such section.—Chicago Journal Co. v. Industrial Commission, Ill., 136 N. E. 697.

59.——Dependents. — A deceased employee's grandchild who lived with him as a member of his family after the death of her mother, and was supported by him, and relied upon him for support and reasonable necessaries, was a "dependent" within the Workmen's Compensation Act, though the child's father was under legal obligation to support her —Superior Coal Co. v. Industrial Commission, Ill., 136 N. E. 762.

60.——Dependents.—A deceased employee's parents, alien residents of a foreign county, held not conclusively presumed to be dependent on him, but, under Workmen's Compensation Law (Code Supp. 1913, § 2477m16 [5]), dependency was a fact to be established.—Serrano v. Cudahy Packing Co., Iowa, 190 N. W. 132.

61.——Election.—The signing by an employee of the notice of election prescribed by Workmen's Compensation Act (Ky. St. § 4957), is not a mere offer to accept a remedy, but is an actual acceptance constituting a contract binding on the employee as well as on the employer electing under section 4956, until withdrawn in the mode prescribed by section 4959 —Taylor's Adm'r v. Bates & Rogers Const. Co., Ky., 244 S. W. 693.

62.——Employee.—One employed in a portable sawmill used for cutting dead timber on a large estate maintained for the pleasure of the owner, employing more than three workmen on the place, is an employee of one subject to the Workmen's Compensation Act, defining the terms "employer" and "employee."—Pierce v. Barker, Wis., 190 N. W. 80.

63.——Employer.—One who dismantles or reconstructs buildings of less than three stories in height, and engages workmen for that purpose, is an "employer," and his workmen are "employees," as defined by section 9, c. 15p, Code 1918 (Code 1913, c. 15p, § 9 [sec. 665]; Workmen's Compensation Act), and both are subject to the provisions of that chapter.—Sole v. Kindelberger, W. Va., 114 S. E. 151.

64.——Injury.—Where a shingle sawyer transferring heavy blocks from a platform to a carrier sustained a rupture of a previously diseased appendix due to the pressure of the blocks when lifted, the occurrence constituted an "injury," defined by Rem. & Bal. Code, § 6604-3, as amended by Laws 1921, p. 720, § 2, declaring that the word refers only to an injury resulting from some fortuitous event.—Shadbolt v. Department of Labor and Industries, Wash., 209 Pac. 683.

65.——No Award.—Compensation for death from sunstroke can be awarded only where the injury is one resulting from a hazard inseparably connected with the industry or substantially increased by reason of the nature of the employment; and, where exposure to the hazard was not different substantially from that of ordinary out-of-door work, no award of compensation can be made.—Lewis v. Industrial Commission, Wis., 190 N. W. 101.

66.——Notice.—A posted rule forbidding miners to ride in empty cars to and from work is not binding on one unable to read English and given no information concerning it.—New Stauton Coal Co. v. Industrial Commission, Ill., 136 N. E. 782.

67.——Personal Acts —Where employer, as a part of the contract of employment, permitted employees going to and from their work to ride free on logging trains running between a town and employer's logging camp, and an employee, who left his home at the camp Saturday afternoon, after working hours, for purpose of visiting his father in town, was injured by the lurching of the train while returning to camp Sunday afternoon, his injury did not arise "out of and in the course of employment," within the Workmen's Compensation Act, the trip being personal, and therefore the statute could not be invoked to defeat recovery in a common-law action.—Norwood v. Tellico River Lumber Co., Tenn., 244 S. W. 490.

68.——Question of Fact.—The unreasonableness of the refusal of an injured employee, who is seeking to recover compensation under the Workmen's Compensation Law, to permit an operation to be performed, is a question of fact to be determined from the evidence.—Frost v. United States Fidelity & Guaranty Co., Neb., 190 N. W. 208.

69.——State Code —Gen. Code, § 1027, requiring employer "to make suitable provisions to prevent injury to persons who use or come in contact with machinery," does not prescribe a "lawful requirement" within constitutional and statutory provisions that the Workmen's Compensation Act shall not take right of action from employee injured because of empolyer's failure to comply with lawful requirement for protection of lives, health and safety of employees.—Toledo Cooker Co. v. Sniegowski, Ohio, 136 N. E. 904.

70.——Within Scope.—Where a miner had never been ordered not to pull down loose rock before his injury in removing rock with the aid of the employer's agent, who initiated such removal, and, on the contrary, it had been customary for employees to do such work, and they had been paid therefor, and plaintiff's attention had been called to the dangerous condition, and he was attempting to remove the danger that threatened the miners there engaged and the instrumentalities there employed in the master's business, the injury arose out of and in the course of the employment, within Workmen's Compensation Act, § 1.—Ex Parte Majestic Coal Co., Ala., 93 So. 728.

71.——Within Course of Employment.—Where a bucker in a logging camp gave notice one morning of his desire to quit work that evening, and after the evening meal went to the office to ascertain the amount of his scale, and to receive his compensation, and was there assaulted by the foreman, the relation of employer and employee was not terminated, and he was entitled to compensation under the Workmen's Compensation Act.—Perry v. Beverage, Wash., 209 Pac. 1102.